

The Judging Cycle: Federal Circuit Court Style

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When I was a young law professor, recently released from military service, Jerome Frank's emphasis on the importance, as well as the intrinsic uncertainty, of the facts in a lawsuit struck me as interesting.¹ However, this emphasis did not seem immediately useful in my efforts to teach Contracts and what was then known as Bills and Notes and Sales. My concerns were to communicate the rules and to illustrate their scope through the use of the facts of cases, compiled in a book by a much older and more experienced professor, and my own often hastily constructed hypothetical fact situations.

Seldom was I concerned with how facts came to be or with their possible uncertainty and ambiguity. Facts were either what the cases in books, or I in my hypotheticals, said they were. After all, it was law, not facts (however determined) that I was teaching. My colleagues in the fields of procedure and evidence could take care of "the facts."

In my years as an appellate judge, I have come to appreciate Frank's view of "facts." Of course, the access of appellate judges to the facts is limited to the record and the portions of oral argument that are both consistent with the facts and helpful. Briefs that accurately state what is in the record, and that correctly cite thereto, are helpful. However, all too often the citations are faulty and their factual recitations are both partial and infected with partisan bias. As a consequence, even though I read the brief as my duty requires and usually am aided by a clerk-prepared bench memorandum, I frequently examine pertinent portions of the record.

The record, however, presents only a "version" of the facts. As Frank taught us, each witness to the "facts" captures a "version" which frequently is altered over time for many reasons, some inadvertent and some not.² Moreover, the record itself is sometimes inconsistent, incomplete, or ambiguous. Nonetheless, the appellate judge must apply the "law" to these "facts"; however, the "law" frequently is neither required nor permitted to ignore inconsistencies, incompleteness, or ambiguities. Finally, the appellate judge must know and adhere to the record as received from the lower court and compiled by the parties. Nothing so quickly undermines the credibility of an opinion as a demonstrable failure to present the record accurately.

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¹ See JEROME FRANK, *COURTS ON TRIAL; MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

² FRANK, *supra*, note 1, at 17.

It is at this point that the appellate judging process approaches the point of commitment. Prior to this point, at least for most judges, the process is one in which several alternative resolutions of the case have been considered and have been either temporarily rejected or tentatively classified as possible solutions. The study of the facts, informed to some extent by the arguments set forth in the briefs, exerts some force in this sifting process.

Slowly, or in some instances quickly, one alternative emerges within the mind of the judge as the one most reasonably compatible with the facts, the text of the law, and most importantly, the judge's sense of what is right, proper, and just. The judge at this point very likely will begin to frame an opinion in his mind and sometimes even attempt the drafting of one or two of the key paragraphs of the envisioned disposition.

For most federal appellate courts, this entire process takes place before oral argument. This approach explains why such arguments often resemble the chorus of attorneys supporting the melody of argument among the sitting judges. In any event, viewpoints, once tentative, tend to become more positive during oral argument and frequently are stated with firmness in the panel conference thereafter. The opinion expressed during the panel conference is seldom substantially altered later, although there is often some jockeying between the majority and a dissenting judge over the precise language of their respective opinions.

At this juncture, one is entitled to ask: What was it that made that *one* alternative that surfaced during the judge's preparation emerge as the preferred one? Isn't that the critical event in the judging of a legal dispute? Certainly it is the *initial* critical point. However, the *source* of that single alternative will always remain a mystery. Based on my observations and self-analysis of almost a quarter of a century, I can only make these comments.

Each judge has a *personal* history commencing centuries *before* his birth. That is, each of us, including judges, has ancestors whose experiences are transmitted from generation to generation and which in many quiet and even stealthy ways make up the culture into which each is born. Be it exalted, wretched, or somewhere in between, its influence is there, whether manifested by one's revulsion and revolt, prideful acceptance, or once more something in between.

We Americans, often for good reasons, deny this reality. This denial has legitimate sources; we do inhabit a land we seized from others who long preceded us and on which we have brought a nation to the forefront of the present world's civilizations. We share the feeling that in some way we must be unique and the claims of the past must be rejected. To so aspire is noble, but in no way can we wholly escape our past. Its grip is tenacious.

Nonetheless, the individual judge is more than his or her cultural past. Each brings to judging intelligence, training, and experience in life, all melding to yield a unique person and judge. It is this past, both distant and recent, that leads to political affiliations that usually fix one's eligibility for appointment or election to the bench. Also, this past, again both distant and recent, heavily influences the emergence of that preferred alternative selected by the judge during the early stages of his or her study of the case.

Applicable precedents can preclude that alternative, but few judges will surrender meekly. Efforts to find viable distinctions will be made. But "viability" is not a rigid concept. In determining its presence, the judge will consult related cases, law reviews, applicable texts, as well as a personal estimate of the probable attitudes of those colleagues who will also sit on the case. At this point the judge's intellectual integrity is put to the test. Will affection for the preferred alternative lead to an embrace of spurious distinctions of relevant precedent? Or will the judge reluctantly surrender that alternative and bow to authority? This dilemma is where the quiet inner battles of a judge are fought. Only over a substantial period of time can the wise observer know how well a particular judge handles those struggles.

With either a sense of "justice being done" or "surrender to imperfect law," the judge proceeds to ready himself for oral argument. Assignment to a clerk to prepare a supplementary memorandum and more "book time" for the judge may be necessary before the judge's confidence in the selected result is strong enough to permit turning to another case on the calendar.

As this process repeats itself, memoranda from other judges on the panel may appear which can either strengthen or weaken the recipient's perception of the case. In any event, in due course preparation for hearing of the calendar is completed. The troublesome cases in which there is either doubt or conflict among the members of the panel are identified.

Oral argument tests these preconceptions of the judges. Of course, the attorneys are given the opportunity to make their arguments, but often primarily by parrying the hostile questions of a doubting judge. A silent judge generally is either already convinced that the attorney's position is correct or considers it a hopeless cause. There are exceptions, but they are rare.

When the last attorney has spoken and the court adjourned, the panel commences its deliberations. Because the differences, as well as the agreements, among the panel members are well known at this point, the deliberations usually proceed rather quickly. Troublesome cases where uncertainty prevails are put aside, while those whose results are clear are assigned by the presiding judges for the preparation of dispositions. Those presenting difficulties also are assigned as the presiding judge chooses, with the understanding that any resolution employed by that judge is tentative.

Frequently it is the presiding judge who undertakes this effort to find a consensus.

Preparation of the opinion usually is a fairly straight-forward undertaking. In the days of Learned Hand and earlier, the opinion was the work of the judge exclusively. However, with the litigation explosion of the post-World War II era, however, most initial drafts are now prepared by a clerk, preferably the one who prepared the bench memorandum pertaining to the case. However, many judges, including myself when time permits, will undertake the initial draft of a case of either particular complexity or of special interest to the judge. In any event, it is rare for an opinion to be circulated to other judges on the panel prior to a thorough review and often extensive revisions by the judge to whom the duty of preparing the opinion was assigned.

Thereafter, within various time spans, concurrences from the two non-writing panel members are indicated. The degree of attention given to a fellow judge's opinion varies greatly from judge to judge, even when a judge concurs in the result. Experience as a judge usually accelerates such reviews.

The situation of a dissenting judge is quite different. That judge has been thinking about the case since the day of the conference; clerks have been alerted and directed to pursue various avenues of research and the judge may have commenced the draft of the dissent prior to the receipt of the majority opinion. In due course, the dissent is completed and presented to the majority. What may follow is unpredictable, except that seldom does a dissenting opinion become the majority view. A more common pattern is that the interactions between the two camps will lead to various modifications of both majority and minority opinions. Seldom does each side hold firm on the precise language of its original formulation of its position.

Once a disposition is filed, there sometimes erupts a clamor by one or more judges, not members of the panel, of strong objections to either the result, the reasoning, or both. En banc calls are made or threatened. A flurry of memoranda are exchanged; charges, counter charges, affirmations, and denials fly from one chambers to another. Indeed, these often constitute the most interesting writings of an appellate court. A successful en banc call initiates a new round of preparation for oral argument and decision-making for those active judges who are members of the en banc court and who did not hear the case initially.

En banc hearings and opinion preparations follow roughly the pattern applicable to three-judge panels, except that each step is more time consuming and complex. The larger the en banc court, the greater are these difficulties.

Concurrently, the regular flow of hearing calendars also continues. Each judge's file drawers are full of unheard appeals. The judge again picks up briefs he or she has never seen before. He or she starts to read, and while

doing so, several alternative resolutions emerge which he or she weighs, revises, casts aside, and retrieves, slowly settling on one, or several, strong possibilities. Another cycle of decision-making is underway.

